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# In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, PETITIONER

*v.*

UNITED ARTISTS TELEVISION, INC.

*ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

Certiorari was granted in this case on December 4, 1967, and the Court invited the Solicitor General to express the views of the United States. This memorandum is filed in response to that request.

### I

The overall problem is a large one, with substantial ramifications in the fields of copyright policy, communications regulation, and antitrust law. In the long run it requires a comprehensive plan of solution which can only be provided by legislation. Efforts toward achieving a legislative solution have been underway for some time. But the process of resolving the conflicting interests and pressures, private and public, in

a satisfactory and sensible way is a complicated and difficult one, and it is uncertain when it can be brought to a completion by Congress. In the meantime, this Court is faced with the problem of deciding the question of CATV liability for alleged infringement under the existing copyright law. The Court's decision in the instant case may contribute to the ultimate legislative solution.

## II

With respect to the basic question considered below, we conclude that the court of appeals was correct in deciding that the activities of the CATV systems constitute a "public performance" within the meaning of Sections 1(c) and 1(d) of the Copyright Act (17 U.S.C. 1(c), 1(d)). To be sure, arguments can be made, and were made in the courts below, that no "performance" is involved where a CATV system merely furnishes signals which result in pictures only on the home sets of subscribers. But we believe the language of the Copyright Act should be read in light of economic and technological realities. Whether the precedents relied on by the courts below, such as *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191, and *SESAC* v. *New York Hotel Statler Co., Inc.*, 19 F. Supp. 1 (S.D.N.Y.), are directly pertinent is not, in our view, of controlling significance. Those cases—and other like decisions—do reflect a basic approach which should obtain here. Because the Copyright Act was enacted before CATV came into existence, there is no direct evidence of congressional intent. We must therefore seek an answer to the question whether CATV service results in infringing public performances by

construing the relevant statutory provisions in light of new technology, keeping in mind that the Act gives the copyright owner the "exclusive right" to "exhibit, represent, produce, or reproduce [the copyrighted work] in any manner or by any method whatsoever" (17 U.S.C. 1(c)).[1]

As the district court pointed out, CATV systems provide something more than simply an antenna service. It stated (App. 20a):

> * * * Defendant's two systems are not "community" ventures. They are large-scale commercial enterprises, advertising and promoting television programs, and making profit out of the exploitation of television programs, including plaintiff's copyrighted motion pictures. Nor are defendant's operations simply that of passive "antennas" used only to receive telecasts. In fact, defendant's two systems, among other processes, receive, electronically reproduce and amplify, relay, transmit and distribute television programs—operations requiring complex, extensive and expensive instrumentation. These systems function as wire television systems, only one of whose structural components consists of antennas.

So viewed, it seems clear that CATV systems engage in a significant array of activities directed toward providing television signals to persons at least some

[1] Similar language is likewise contained in Section 1(d) of the Act. Section 1(c) requires that the public performance be "for profit" for copyright protection to apply; Section 1(d), which relates only to dramatic works, does not include such a requirement. Here the difference is of no significance since no contention was made that the public performances, if any, were not for profit (see App. 1345, n. 1).

of whom would not otherwise be able to receive them and who are willing to pay for such service. It is established that there can be multiple performances of a copyrighted work occurring simultaneously, and that it is of no consequence that the actual rendition takes place in the privacy of a number of homes, rather than in public. *Buck* v. *Jewell-LaSalle Realty Co., supra,* 283 U.S. at 198; *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.,* 5 F. 2d 411 (C.A. 6), certiorari denied, 269 U.S. 556. Whether one focuses on the electronic process involved, or simply on the fact that CATV systems do a substantial amount of things to permit their subscribers to receive signals, it is difficult to disagree with the conclusions reached below—that CATV carriage of a copyrighted work results in a "public performance" within the meaning of the Copyright Act and thus subjects the systems to liability where they infringe the copyright owner's "exclusive right" without having obtained a license to do so.

What a CATV system essentially does is to deliver a signal to the subscriber. That the signal, by itself, is not intelligible without the intervention of further equipment is of no moment. The fact is that the signal does "reproduce" the copyrighted work in a "manner" or by a "method" as effectively as if the CATV system made a tape recording of the copyrighted work and offered it for sale to persons who had equipment capable of converting the recording into a visually observable representation. There can be no doubt that the tape recording would be a reproduction—just as an undeveloped photograph would be a

reproduction, and an infringement of a copyrighted original, even though the purchaser was required to carry out the steps which would make the image intelligible to the human eye and mind. CATV activities are not different in kind; the image is present within the system, and it is provided to the consumer by the CATV intermediary. It simply cannot be gainsaid, in our view, that this constitutes the sort of reproduction which is within the ambit of the Copyright Act.

III

The question remains whether there is in the law, or should be established in the law by this Court, any limitation on the "exclusive right" of the copyright owner. Such limitations are not foreign to the copyright field. There is, for example, the doctrine of "fair use," which provides some qualification of the exclusive right. That doctrine does not appear directly applicable here, since we are dealing with a large-scale commercial enterprise, which, in the aggregate, involves great expenditures for equipment and millions of potential viewers (but see *infra*, p. 8). Nor does the so-called "first sale" doctrine, another recognized limitation on copyright liability, appear pertinent here.[2] On the other hand, a "license implied in law" might appropriately be said to apply at least to some CATV activities. Of course, a "license implied

[2] Under the "first sale" doctrine a copyright owner who has authorized the sale of a copy of his work can no longer control the resale or physical use of the copy, *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339, although he can prevent the reproduction, recording, or performance of his work from the copy.

in law" is not a license at all, but is simply a rule of law fashioned by the courts in order to take care of practicalities, equities, and other factors in a given situation.[3]

Under authority given in the Constitution, Congress grants a monopoly through the copyright law for the express purpose of promoting "the Progress of Science and Useful Arts" (U.S. Constitution, Art. I, Sec. 8, cl. 8). Copyright protection should be viewed against the background of the purpose which it is intended to further. That purpose obviously does not require assuring copyright owners the highest possible profits in all cases. Rather, what is essentially involved, from the point of view of sound public policy, is to provide an atmosphere in which authors have a strong incentive to create and disseminate their works, and are given the opportunity to obtain fair remuneration for the use of them. *E. g., Mazer* v. *Stein,* 347 U.S. 201, 219; *United States* v. *Paramount Pictures, Inc.,* 334 U.S. 131, 158.

Another objective to be kept in mind is minimizing the potential for monopolization of an industry. In a very real sense, the Federal Communications Act, at least in the instant context, and, to a considerable extent, the antitrust laws as they have developed, are factors to be considered in interpreting and assessing the application of the existing copyright law. These

[3] An "implied-in-law license" concept has been developed to some extent in the field of patent law. It is narrow in scope, and has been used primarily in two areas: (1) use and resale, and (2) repair or improvement of patented articles. See, *e.g., Aro Mfg. Co.* v. *Convertible Top Replacement Co.,* 377 U.S. 476, 497.

can be harmonized by recognizing the impact of the conclusion reached as to the copyright law question here presented on the development of independent and competing elements in the industry.[4] Just as in *White-Smith Music Co.* v. *Apollo Co.*, 209 U.S. 1, 18, where it was concluded that copyright protection did not extend to player piano rolls—a new development not contemplated by Congress—this Court could hold that until Congress acts specifically it should not by its own action extend the copyright monopoly without any qualification into a wholly novel and uncontemplated area. In sum, as this Court observed in *Bobbs-Merrill Co.* v. *Straus*, 210 U.S. 339, 346: "The copyright statutes ought to be reasonably construed with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant."

We recognize that there is a significant lack of precedent for the implication of a copyright license

[4] It should be noted that, in contrast to the relatively diffuse condition of the CATV industry, the control of copyrights on television programming is concentrated in the three networks and seven major movie studios. Antitrust considerations thus argue strongly against the imposition of the structure of these older industries on the young CATV industry, which could occur were the networks and film studios to obtain control of CATV systems. Moreover, the larger CATV systems have some potential, if they develop independent of domination through control of access to programming, of ultimately becoming significant originators of programs and thus competitors of the existing networks, a development which may well be in the public interest.

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in light of policy considerations. The *dictum* in *Jewell-LaSalle* (283 U.S. at 199, n. 5) is not persuasive authority, and the holding in *Buck* v. *Debaum*, 40 F. 2d 734 (S.D. Calif.), while arguably in point, appears to involve the only situation in which a court has taken such a step. Nevertheless, and despite the absence of any specific provisions in the Copyright Act, analogous holdings do exist, such as in the development of the so-called "fair use" doctrine. See, *e.g.*, *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303 (C.A. 2), certiorari denied, 385 U.S. 1009.[5] Nor should the absence of definitive precedent in any event be decisive. The same judicial flexibility in construing the Copyright Act which admits of its application to new developments in technology should similarly obtain, in our view, in recognizing underlying considerations of public policy, such as the limited nature of copyright protection and the consequences of extending copyright protection unduly. See, *e.g.*, *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127.

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[5] Under the "fair use" doctrine a third party, not in privity with the copyright owner or his licensee, may, notwithstanding the absence of any specific provision in the Copyright Act, engage in certain acts of copying without being subject to liability under the Act. That doctrine thus provides a useful analogy for the approach which we suggest here, both because application of the doctrine results in the third party having what may fairly be called an implied-in-law license to copy (see Yankwich, *What is Fair Use?*, 22 *U. Chi. L. Rev.* 203, 214 (1954), and because under the doctrine, as in the present case (see *infra*, pp. 10–11), a "central question" is whether the alleged infringer's activity "tends to diminish or prejudice the potential sale of the plaintiff's work" (*Nimmer on Copyright*, § 145, at 646; and see *Folsom* v. *Marsh*, 9 Fed. Cas. (No. 4901) 342, 348 (C.C.D. Mass. 1841); Yankwich, *supra* at 213).

It was contended in the lower courts that even if a public performance of copyrighted works resulted from CATV carriage of television signals, a license implied in law should be found to exist generally in favor of the CATV systems. It was suggested that such a license should be found as to all programs carried, whatever their source and wherever reproduced. On this issue we agree with the courts below. Implication of a license in all circumstances would be tantamount to holding that once a copyrighted work was licensed to anyone it was irrevocably and entirely committed to the public domain. There seems to be no basis for such an implication, and it would be inconsistent not only with the terms of the statute but also with existing precedents and with sound policy. In addition, it would be inconsistent with sound regulation of the nation's television resources, as expressed in the channel-allocation plan devised by the Federal Communications Commission pursuant to the specific congressional mandate to maximize television service through the extensive use of local stations.[6]

On the other hand, the economic realities of the broadcasting industry suggest the appropriateness of

[6] See the F.C.C.'s Sixth Report and Order, 17 Fed. Reg. 3905. Reference should also be made to the congressional policy favoring the development of UHF stations which, the Commission noted in its Second Report and Order, 31 Fed. Reg. 4540, were likely to suffer significantly from the unrestrained growth of CATV in metropolitan areas. In large part this difficulty stemmed, in the Commission's view, from the fact that CATV systems, unlike broadcasters, have not paid for programming which they provide, resulting in a situation of unfair competition between CATVs and independent and UHF stations.

implying a more limited license for CATV activities. Television stations of course subsist through the sale of advertising time to commercial sponsors. Advertising revenues are ordinarily measured by the size of the audience which the sponsor of a particular program is able to reach. Television stations also pay royalties to copyright owners for the right to perform copyrighted works. Where a station's audience is increased as a result of CATV carriage of its signals, an increase in advertising revenues can be expected, so long as those viewing the programs are within the category of persons the advertiser seeks to reach. And where advertising revenues are increased, it might be expected that copyright owners can obtain greater royalties for licensing the performance of their copyrighted works.

However, much of the advertising which accompanies the performance of copyrighted works, such as motion pictures, is directed solely at potential viewers who are within the station's normal service area—"local" advertising and "national spot" advertising both fall within that category. Such advertisers do not necessarily derive any significant commercial benefit from CATV carriage of the sponsored programs outside of the market ordinarily served by the particular station, and accordingly may be unwilling to pay additional amounts for such expanded coverage. Transmission of a sponsored program into a distant market, where CATV penetration is substantial, may also significantly decrease the potential audience in that market for the program and adversely affect the advertising revenues which a local station there could otherwise expect to obtain from program sponsors.

Should this happen, the net result may be to diminish the value of a copyrighted work in the distant market without any corresponding increase in the copyright owner's royalties from the originating market.

In short, CATV carriage of copyrighted works within the licensed station's normal service area cannot be expected to have a substantial adverse impact on the incentive to create, while extension of the station's signals outside that area may well have such an effect.

## IV

The considerations just discussed would point in the direction of implying a license for CATV carriage of signals within the normal service area of the originating station. It remains, however, to find a workable measure of this area.

In the courts below it was suggested that, at least in those areas where the signals carried by CATVs could be directly received off-the-air by potential viewers, without the need for CATV service, an implied-in-law license to perform copyrighted works should be found. This suggestion was rejected by the district court (App. 88a), but the question was specifically reserved by the court of appeals. It stated (App. 1366):

> A different case might be presented, which we do not decide, if a CATV system's subscribers could receive one or more of the stations carried satisfactorily by normal antennas, as it might then be contended that a copyright holder's licensing a broadcast of a work over such a station must be held to have licensed their viewing of the work.

What the court appears to suggest is that an implied-in-law license might be found where, but only where, it is shown that a station's signals can be satisfactorily received by "normal" or "rooftop" antennas (see App. 1364–1366); since such a showing was lacking here, it found it unnecessary to resolve the question.

In our view, the tentative suggestion made by the court below does not provide a useful touchstone, for there will undoubtedly be a large variety of opinions as to what constitutes a normal, rooftop antenna and what amounts to satisfactory reception, and repeated disputes about the scope of a station's ordinary service area, if so measured. Such an approach would simply never provide, with any degree of certainty, a workable definition of the geographical area within which a license for CATV carriage might be implied. There is, however, another possibility, which was considered and rejected by the court of appeals (see App. 1365, n. 14). That is to measure the scope of the implied license by reference to the "Grade B contour" of the originating station,[7] a concept developed by the Federal Communications Commission under its authority "to establish areas or zones to be served by any station" (47 U.S.C. 303(h)). Here the areas served by the CATV systems were within the Grade B contours of some of the stations carried (see *infra*, p. 16). Thus, if this approach were to be followed, an implied-

[7] A Grade B contour is defined as the line which defines the area at the perimeter of which a good picture can be expected for 90 percent of the time at the best 50 percent of the locations. Sixth Report & Order, 17 Fed. Reg. 3905, 3915; see 47 C.F.R. 73.683, 73.689; see also *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 225 F. 2d 511, 515–516, n. 12 (C.A.D.C.).

in-law license would exist as to some of the signals carried.

In its Second Report and Order the Federal Communications Commission explicitly noted the valuable and useful function which CATV systems provide in supplementing off-the-air television service and in improving the variety and quality of television reception in various parts of the country. In asserting jurisdiction over non-microwave CATV in 1966, the Commission's essential purpose was only to regulate the growth of CATV along lines consistent with the public interest. To protect local stations, the Commission adopted its local carriage and non-duplication requirements, both of which in substance require a CATV system located within the Grade B contour of a television station to carry that station on its system and not duplicate its programming by carrying another, more distant station when both are broadcasting the same program. In addition, the Commission adopted a distant-signal rule applicable to CATVs in the top 100 television markets, which again is geared to the Grade B contour concept and which prohibits the extension of signals beyond a station's Grade B contour into one of these major markets except after an evidentiary determination in each case that such extension would not be detrimental to local television service in the affected area.[8]

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[8] In discussing the Grade B contour concept in Memorandum Opinion and Order, 8 Pike & Fischer R.R. 2d 1677, 1691, the Commission recently stated:

> We think that the Grade B contour is a reasonable demarcation between a distant and local signal. See Section 303(h) of the Communications Act. We regard this contour as generally delineating the area within which service

Accordingly, it is our view that, in rejecting the use of Grade B contours, the court of appeals unnecessarily discarded a valuable guide for determining where an implied-in-law license should be found. We acknowledge that there are difficulties inherent in adopting a rather technical and artificial concept such as predicted Grade B contours as the sole criterion in determining the copyright liability, or exemption therefrom, of CATV systems. As presently calculated, such contours are theoretical estimates which do not precisely measure the actual range of a station's signal in all situations. Moreover, they are subject to change as a result of changes in the power of a station or in the location of its transmitter. Indeed, the whole "contour" concept may become obsolete if (through satellite and other improvements) a station's signals can be extended to encompass the entire continent. What is more, the Commission itself has recognized that the *predicted* Grade B contour of a station—calculated without taking into account differences in terrain or special conditions creating interferences—is only an approximation of the normal service area. That body accordingly permits the parties to demonstrate, in a given case, that the *actual* contour is different. First Report and Order, 38 F.C.C. 683, 730–731; *Bluefield Television Cable,* 10 F.C.C. 2d 731, 732; 47 C.F.R. 73.684(f).

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from the station can reasonably be expected. The carriage requirements as an allocation principle are geared to the Grade B contour in order that the station may have access to all persons within this general service area. Beyond this point the CATV system is, in a real sense, extending the service area of the station by markedly changing the quality of the signal being received * * *.

In our view, however, the inexactness and instability of the predicted Grade B contour as a measure of a station's service area is probably outweighed by the certainty it provides as to much of the area covered. The predicted contour line is currently the only perimeter readily identifiable by reference to a map. At least until uniform and reasonably simple procedures for measuring "actual" contours are developed—a task now underway—we believe that "predicted" Grade B contours provide the most feasible tool for defining, however roughly, the normal service area of the originating station. Within that area, we suggest, a license to carry the programs may generally be implied.

We add only a *caveat* for special situations in which, because an area served by a CATV system is within the city grade or Grade A contour of local stations, it might appear unfair to imply a license to carry copyrighted works licensed to other stations whose Grade B contours include that area, at least where it can be shown that the local and outside stations actively seek exclusive licenses to perform the same works.[9] Of course, that problem arises however one defines a station's normal service area. In our view, it is a matter that can properly be left for case-by-case resolution, and which, in any event, will hope-

[9] To use a local example, Baltimore TV stations place a Grade B signal over Washington, as do the Washington TV stations over Baltimore. However, in both communities the truly local signals, being more powerful (*i.e.*, city grade), are largely watched, with the result that the copyright owner can give an exclusive license for his film in Baltimore, without significantly impairing the value of the exclusive license he sells to the Washington station. A Washington CATV system, with an unqualified implied license in law to carry the Baltimore signal, thus could markedly affect the value of the license to the Washington station.

fully be taken care of by legislation (see note 10, *infra*).

Adoption of the approach we have suggested would result in a substantial coalescense of communications and copyright policy with regard to CATV. With perhaps minor exceptions, no adjustment of the Commission's local-carriage rule would be required, and each policy would tend to support the other. Nor is it irrelevant that implying a license for CATV carriage of signals within the Grade B contour of the originating station coincides, at least in rough outline, with the most likely legislative resolution of the matter of CATV copyright liability for the future.[10]

## V

If a development of the law along these lines is adopted, the judgment below should be vacated insofar as it rejected petitioner's claimed exemption where it did not carry signals beyond the Grade B contour of the originating station—which was the fact with respect to four of the five signals distributed to Fairmont subscribers, and one of the five signals brought

[10] Legislation which eventuates may well follow the pattern of the Kastenmeier bill (H.R. 2512, 90th Cong., 1st Sess., Sec. 111), which, in substance, established three zones in which CATV copyright liability would differ. One was the normal service area of the station carried, which probably would be measured, as a matter of fact, by the Commission-prescribed Grade B contour—in this area no copyright liability would result from CATV carriage of the station, except where a station providing a higher grade signal had obtained an exclusive license for a particular work. In unserved or underserved areas outside a station's normal service area, compulsory licensing of copyrighted works at reasonable royalties would be required. In other areas full copyright protection would be accorded.

into Clarksburg—and the case remanded to the district court to determine whether there are any special circumstances of overlapping (see *supra,* p. 15) which might argue against implying a license on the particular facts involved. Of course, such a ruling would dispose of the present case without fully resolving many of the problems posed by CATV operations under the existing copyright law. Although the approach we suggest would substantially lighten the burden, the matter of CATV liability for past infringement would remain. Nor does this resolution of the problem provide for reasonable royalty arrangements, compulsory licensing in certain areas, or a workable royalty payment scheme. And the approach outlined does not offer an incentive to CATV growth in unserved and underserved areas, where the potential harm to copyright owners seem less serious.

Some of these matters, it seems to us, are more appropriately dealt with by negotiation between the parties. Others are perhaps more fittingly solved by legislative action. At least, we are unable to suggest an acceptable construction of the Copyright Act that would permit their determination in judicial proceedings. Nevertheless, we submit that the approach urged here, in taking into account underlying policy considerations to the extent consistent with the limits of existing law, points in a direction that will facilitate the ultimate solution of the question in the public interest.

Respectfully submitted.

ERWIN N. GRISWOLD,
*Solicitor General.*

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